89-1282 (1)

No.___

IN THE

SUPREME COURT OF THE UNITED STATES

January Term, 1990

ALLISTER BARKER,
Plaintiff-Petitioner

v.

CITY OF PHILADELPHIA

and

LEONARD H. DAGIT, INC.,
Defendants-Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

MARTIN B. PITKOW
Counsel of Record

ALVIN FREIBERG
DAVID B. COMROE
GLENN F. HING
REBECCA M. LANDES
ROBERT J. WILSON
Counsel for Petitioner

LIPMAN, FREIBERG, COMROE & HING
1700 Market Street
Suite 1400
Philadelphia, Pennsylvania 19103
(215) 568-0400

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

74 pp

QUESTIONS PRESENTED

I. Did the Supreme Court of Pennsylvania, the Commonwealth Court of Pennsylvania and the Court of Common Pleas of Philadelphia County through their interpretation of the right and ability of a litigant to amend pleadings under the Pennsylvania Rules of Civil Procedure and/or the Eminent Domain Code of the Commonwealth of Pennsylvania, or by denial of review thereof, conflict with federal procedural due process, deprive petitioner of his procedural due process rights under the fifth and fourteenth amendments of the Federal Constitution and potentially deprive all litigants in the Commonwealth of Pennsylvania of their procedural due process rights under the Federal Constitution so that certiorari is warranted?

IA. Did the state courts of Pennsylvania deprive petitioner of his due process right to be heard when the appellate court of Pennsylvania overruled the trial court and decided that petitioner had no right to amend his pleading despite the fact that petitioner's initial pleading, which stated a cause of action, was filed within the applicable statute of limitations and was subsequently dismissed at a preliminary level after the statute of limitations had expired by an order of court which was silent as to amendment?

IB. Did the Supreme Court of Pennsylvania deprive petitioner of his procedural due process rights under the Federal Constitution by denying petitioner's petition for allowance of appeal from the order of the Commonwealth Court of Pennsylvania, which petition raised the federal question of the denial of petitioner's due process rights?

IC. Did the Commonwealth Court of Pennsylvania deprive petitioner of his procedural due process rights under the Federal Constitution by unconstitutionally engaging in legislative rulemaking and by improperly

promulgating a new statute or rule pertaining to amendment of petitions for the appointment of a board of viewers and by enforcing it retroactively?

ID. Did the Commonwealth Court of Pennsylvania deprive petitioner of his procedural due process rights under the Federal Constitution through its interpretation of the Pennsylvania Rules of Civil Procedure with regard to amendment of pleadings, which interpretation conflicted with federal procedural due process?

IE. Did the Court of Common Pleas of Philadelphia County deprive petitioner of his procedural due process right to have an opportunity to be heard before being deprived of his property by sustaining the first set of preliminary objections of the City of Philadelphia to petitioner's petition for appointment of a board of viewers and dismissing the petition without specifically giving petitioner leave to amend his pleading?

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OTHER AUTHORITIES

No.____

IN THE

SUPREME COURT OF THE UNITED STATES

January Term, 1990

ALLISTER BARKER,
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CITY OF PHILADELPHIA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

Petitioner, Allister Barker, respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of Pennsylvania, Eastern District in this matter.

OPINIONS BELOW

The unreported memorandum opinion of the Commonwealth Court of Pennsylvania and the unreported opinion of the Court of Common Pleas of Philadelphia County finding in favor of petitioner, entered during the

course of the litigation, are reprinted in the appendix (App.) at App. A-3–A-19.

STATEMENT OF JURISDICTION

The Supreme Court of Pennsylvania, Eastern District denied petitioner's petition for allowance of appeal from the order of the Commonwealth Court of Pennsylvania by order dated October 30, 1989 and entered October 30, 1989.

The jurisdiction of this Court to review the order of the Supreme Court of Pennsylvania by writ of certiorari is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, amendment five, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, amendment fourteen, §1, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The following pertinent constitutional provisions, statutes and rules are reproduced at App. A-25–A-31.

U.S. Const. amend. I
Pa. Const. art. 1, §1
Pa. Const. art. 1, §10
28 U.S.C.A. §1257a (West Supp. 1989)
Pa. Stat. tit. 26, §1-406(e) (Purdon Supp. 1989)
Pa. Stat. tit. 26, §1-502(a) (Purdon Supp. 1989)
Pa. Stat. tit. 26, §1-504 (Purdon Supp. 1989)
Pa. R. Civ. P. 126
Pa. R. Civ. P. 1007
Pa. R. Civ. P. 1033

STATEMENT OF THE CASE

This action was initiated on or about August 24, 1979 by the filing of a petition for the appointment of a board of viewers in the Court of Common Pleas of Philadelphia County, which petition was given a court term and number. The petition averred that on or about October or November of 1977 the City of Philadelphia ("City"), while constructing a playground on the City's land, by and through its authorized agent, Leonard H. Dagit, Inc., paved and blacktopped a four by one hundred foot (4' x 100') portion of petitioner's land and, in the course thereof, also caused various items of structural damage to petitioner's property.

On or about February 25, 1980 the City filed preliminary objections to the petition for the appointment of a board of viewers. Paragraph one of the City's preliminary objections stated, in pertinent part, that "the petition should be dismissed because a *de facto* taking

cannot result from . . . negligent acts. . .". Paragraph seventeen of the City's preliminary objections stated that "the petition should be dismissed because petitioner must seek recovery in an action in trespass, not in eminent domain". The memorandum of law attached to the City's preliminary objections stated, "first, the petition makes out a cause of action in trespass . . . thus the petition makes out a prima facie case in *trespass* . . . the petition states a cause of action in trespass for damage to property". Thus, the City admitted that petitioner had a cause of action against it.

On or about September 17, 1980, seven months after the filing of the preliminary objections, Nicholas A. Cipriani, Judge of the Court of Common Pleas of Philadelphia County entered an order sustaining the City's preliminary objections and dismissing the petition for the appointment of a board of viewers. Judge Cipriani's order was silent on the issue of amendment and did not prohibit the filing of an amended pleading. On September 17, 1980 the statute of limitations for a trespass action had run, same having expired on or about October or November of 1979. After receiving notice of said order of September 17, 1980 on or about October 15, 1980, petitioner filed on November 5, 1980 both an amended complaint under the same term and number of the petition for appointment of a board of viewers and a notice of appeal from the order of Judge Cipriani. The filing of the amended complaint is listed first in the dockets.

On or about November 21, 1980 the City filed another set of preliminary objections to petitioner's pleading. This time the City's preliminary objections, in pertinent part, were based upon the fact that under Pa. R. Civ. P. 1033 petitioner had no permission of the parties or leave of court to file an amended complaint; that the previous order of Judge Cipriani would preclude filing an amended complaint under the doctrine of *res judicata* and that the action should be barred by the

statute of limitations. Despite its filing of preliminary objections, the City also filed a complaint against additional defendant, Leonard H. Dagit, Inc., ("Dagit") on December 29, 1980. Dagit's answer, filed on March 9, 1980, did *not* allege the statute of limitations as a defense.

Thereafter, on April 27, 1981 petitioner filed a praecipe to discontinue his superior court appeal of the September 19, 1980 order of Judge Cipriani sustaining the City's first set of preliminary objections to the petition for the appointment of a board of viewers. The next day, April 28, 1981, Judge Nicholas Cipriani entered an order rejecting the City's claims under Pa. R. Civ. P. 1033, the statute of limitations and *res judicata,* and dismissing the preliminary objections of the City to petitioner's amended civil action. It is important to note that Judge Cipriani who dismissed the City's preliminary objections to petitioner's amended civil action was the *same judge* who initially sustained the City's preliminary objections to the petition for the appointment of a board of viewers. The City's answer and new matter did plead two of the same matters rejected by Judge Cipriani; the statute of limitations and Pa. R. Civ. P. 1033 defenses.

On or about December 18, 1985 almost five (5) years after filing its answer, Dagit filed a motion for summary judgment raising the statute of limitations for the first time. This motion further raised Pa. R. Civ. P. 1033 and the fact that the superior court appeal divested the Court of Common Pleas of Philadelphia County of jurisdiction. The basis of Dagit's motion was substantially the same as that advanced by the City in the City's preliminary objections, which were previously overruled. On or about September 26, 1986 Judge Paul Ribner of the Court of Common Pleas of Philadelphia County entered an order denying Dagit's motion for summary judgment.

This matter came to trial before Judge Victor J. DiNubile, Jr., also of the Court of Common Pleas of

Philadelphia County, on March 11, 1988. At the close of plaintiff's case, the City presented a motion for non-suit. This motion again raised Pa. R. Civ. P. 1033, the statute of limitations and the divesting of jurisdiction, all of which had been previously disposed of by Judges Cipriani and Ribner. Additionally, the City's motion raised, for the first time, collateral estoppel, which was not raised in its answer and new matter. This motion was denied by Judge DiNubile thereby rejecting for the *third* time the defenses raised by the City and Dagit, most importantly the Pa. R. Civ. P. 1033 amendment defense.

Judge DiNubile rendered the verdict on March 15, 1988 in favor of petitioner and against the City in the amount of Ten Thousand Dollars ($10,000.00) and in favor of petitioner, and against Dagit in the amount of Five Thousand Dollars ($5,000.00). Post-trial motions were timely filed by petitioner, with regard to damages, and by both defendants. The City's post-trial motion only raised the statute of limitations and Pa. R. Civ. P. 1033 issues. Dagit's post-trial motion raised Pa. R. Civ. P. 1033;[1] statute of limitations; divestiture of jurisdiction; *res judicata* and the failure of the court to permit Dagit to amend its pleading to include the statute of limitations. All post trial motions were denied by Judge DiNubile on May 5, 1988. On May 9, 1988 Judge DiNubile signed an order entering judgment on the verdict of March 15, 1988. A timely appeal of said order was filed by petitioner and both defendants to the Superior Court of Pennsylvania. On or about August 31, 1988 the Superior Court entered an order *sua sponte* transferring this matter to the Commonwealth Court of Pennsylvania.

On June 23, 1989 the Commonwealth Court of Pennsylvania ("Commonwealth Court") entered an order reversing the Court of Common Pleas of Philadelphia County in part insofar as it denied the City's post-trial motions and affirming said order insofar as it

denied petitioner's post-trial motion. The Commonwealth Court found that petitioner's appeal of the trial court's original order of September 17, 1980 was not timely and, therefore, the Court of Common Pleas of Philadelphia County was not divested of jurisdiction to accept the amended complaint. The Commonwealth Court further found, however, that the trial court's order of September 17, 1980 became the final judgment of the court which could not be amended by filing an amended complaint under any circumstances. The Commonwealth Court also found that under both Pa. R. Civ. P. 1033 and under section 502(a) of the Eminent Domain Code leave of court is needed to amend, even though section 502(a) of the Eminent Domain Code does not so state. Finally, the Commonwealth Court found that leave of court could not be inferred from the fact that the trial judge who overruled the preliminary objections to the amended complaint was the same judge who had sustained the preliminary objections to the original petition.

Petitioner filed a timely petition for allowance of appeal with the Supreme Court of Pennsylvania, Eastern District, on or about June 30, 1989. In his petition for allowance of appeal petitioner raised the federal question of the denial of his due process rights by the Commonwealth Court by its finding that petitioner could not amend his pleading and by its creating a new rule or statute pertaining to amendment of petitions for the appointment of a board of viewers without properly promulgating it, and enforcing it retroactively. The pertinent part of the petition for allowance of appeal which raised the federal questions sought to be reviewed is in the Appendix at A-32–A-38. On October 30, 1989 the Supreme Court of Pennsylvania denied petitioner's petition for allowance of appeal. This timely petition for the issuance of a writ of certiorari followed.

ARGUMENT

I. The Supreme Court of Pennsylvania, the Commonwealth Court of Pennsylvania and the Court of Common Pleas of Philadelphia County through their interpretation of the right and ability of a litigant to amend pleadings under the Pennsylvania Rules of Civil Procedure and/or the Eminent Domain Code of the Commonwealth of Pennsylvania, or by denial of review thereof, conflicted with federal procedural due process, deprived petitioner of his procedural due process rights under the fifth and fourteenth amendments of the Federal Constitution and potentially deprived all litigants in the Commonwealth of Pennsylvania of their procedural due process rights under the Federal Constitution so that certiorari is warranted.

IA. THE STATE COURTS OF PENNSYLVANIA DEPRIVED PETITIONER OF HIS DUE PROCESS RIGHT TO BE HEARD WHEN THE APPELLATE COURT OF PENNSYLVANIA OVERRULED THE TRIAL COURT AND DECIDED THAT PETITIONER HAD NO RIGHT TO AMEND HIS PLEADING DESPITE THE FACT THAT PETITIONER'S INITIAL PLEADING WHICH STATED A CAUSE OF ACTION WAS FILED WITHIN THE APPLICABLE STATUTE OF LIMITATIONS AND WAS SUBSEQUENTLY DISMISSED AT A PRELIMINARY LEVEL AFTER THE STATUTE OF LIMITATIONS HAD EXPIRED BY AN ORDER OF COURT WHICH WAS SILENT AS TO AMENDMENT.

As a result of the state court actions in this case, petitioner, through no fault of his own, has been denied an opportunity to be heard concerning the deprivation of his property rights. Petitioner came to the United States of America on July 15, 1947. He served in the United States Armed Forces for twenty-one (21) months and on

March 30, 1953 he became a naturalized citizen of the United States. Petitioner had great faith in the American system of justice and turned to that system when the City of Philadelphia by and through its authorized agent, Leonard H. Dagit, Inc., paved and blacktopped a four by one hundred foot (4′ X 100′) portion of petitioner's land and caused various items of structural damage to petitioner's property while constructing a playground on the City's land.

Instead of being granted compensation for the negligent or intentional actions of the City and Dagit, petitioner has been put out of court without an opportunity to be heard concerning the deprivation of his property rights. Petitioner, though he does not have much money, is petitioning this Court for a writ of certiorari because he believes so strongly in the principle of his cause and that there is a wrong that must be righted.

Petitioner should not be turned away from this Court because he is only one individual. The due process rights guaranteed by the fifth and fourteenth amendments of the Federal Constitution, which are applicable to the states under the fourteenth amendment, apply to each and every individual with the same degree of importance. The deprivation of one individual's due process rights can lead to the deprivation of the due process rights of other individuals as well. There is the potential that any litigant in Pennsylvania who files a pleading within the applicable statute of limitations, which pleading is thereafter dismissed after the statute of limitations has expired, with no indication as to whether the pleading can be amended, can also be deprived of his or her due process right to be heard, and his or her property can also be taken without just compensation.

There is no question that petitioner herein has a cause of action against defendants-respondents. The

City of Philadelphia itself acknowledged in its preliminary objections to petitioner's petition for appointment of a board of viewers that petitioner had a cause of action against the City in negligence. Moreover, at the trial in this matter Judge DiNubile found in favor of petitioner and against the defendant, City of Philadelphia, in the amount of Ten Thousand Dollars ($10,000.00) and against the additional defendant, Leonard H. Dagit, Inc., in the amount of Five Thousand Dollars ($5,000.00). It is also undisputed that petitioner's original pleading giving the City of Philadelphia notice of the facts constituting his claim was filed within the applicable statute of limitations. Petitioner's initial pleading, a petition for the appointment of a board of viewers, was authorized by Pa. Stat. tit. 26, §1-502(a), which specifically stated that "the condemnee may file a petition requesting the appointment of viewers. . .". The Pennsylvania courts have held that where the legislature has established a specific procedure, it thereby creates an exception to the general rule governing the commencement of actions. *The Commonwealth of Pennsylvania v. Derry Township, West Moreland County, et al,* 10 Pa. Cmwlth. 619, 641, 314 A.2d 874, 879 (1973). Thus, since the Eminent Domain Code establishes a specific procedure for requesting a board of viewers, the legislature has thereby created an exception to Pa. R. Civ. P. 1007, which is the general rule governing the commencement of actions.

Furthermore, while petitioner's initial pleading was labeled a "petition", it served the same purpose as, and had the same essential elements of, a complaint. The petition gave the adverse party, the City of Philadelphia, notice of the facts constituting the claim against it. The City of Philadelphia also had the opportunity to respond to said petition, which it did by way of preliminary objections. The petition set out in consecutively numbered paragraphs, in concise and summary form, the material factual allegations upon which petitioner's cause of action was based, and it specified the relief

sought. The Supreme Court of Pennsylvania has often held that the Pennsylvania Courts can maintain jurisdiction over an action when the pleading initiating the action is substantively adequate in all respects, but is labeled a petition rather than a complaint. *In Re Tax Claim Bureau, German Township, Mt. Sterling 54 1/2 Acres, Miscellaneous Buildings,* 496 Pa. 46, 49-50, 436 A.2d 144, 146-147 (1981); *Pomerantz v. Goldstein,* 479 Pa. 175, 178, 387 A.2d 1280, 1281 (1978).

Whether it be called a petition, a complaint or a civil action, petitioner's pleading was filed within the applicable two year statute of limitations and said pleading tolled the statute. The purpose of the statute of limitations is to discourage stale claims and to expedite litigation. *Ulakovic v. Metropolitan Life Insurance Company,* 339 Pa. 571, 575, 16 A.2d 41, 42 (1940); *Moore v. McComsey,* 313 Pa. Super. 264, 270, 459 A.2d 841, 844 (1983). Petitioner filed his initial pleading within the prescribed statutory period and, therefore, complied with the purpose behind the statute of limitations.

Unfortunately, the order sustaining the City's preliminary objections and dismissing petitioner's petition for appointment of a board of viewers was entered after the statute of limitations for a trespass action had run and the order was silent on the issue of amendment. Under this set of facts, the Commonwealth Court's finding in one cursory sentence unsubstantiated by any citations that the trial court's order of September 17, 1980 dismissing petitioner's petition for appointment of a board of viewers became the final judgment of the court, which could not under any circumstances be amended by filing an amended complaint, effectively denied petitioner access to the courts and an opportunity to be heard concerning the deprivation of his property rights. Potentially any litigant in Pennsylvania could be similarly deprived of his or her due process rights by this rigid reading of the Pennsylvania rules which exalts form over substance and completely disregards the duty

of the Pennsylvania courts to liberally construe the Pennsylvania Rules of Civil Procedure to guarantee justice and fairness.

Pa. R. Civ. P. 126 provides:

> The rules shall be liberally construed to secure the just . . . determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

Ironically, instead of disregarding any error or defect of procedure which did not affect the substantial rights of the parties, the Commonwealth Court completely disregarded Pa. R. Civ. P. 126 and, in doing so, deprived petitioner of his due process rights. Furthermore, any litigant in Pennsylvania who timely files a pleading within the applicable statute of limitations where the pleading is dismissed after the statute of limitations has run by an order of the court which is silent on the issue of amendment, can similarly be deprived of his or her due process rights as a result of the Commonwealth Court's decision, which the Supreme Court of Pennsylvania declined to review.

The Commonwealth Court has inequitably exalted form over substance in a way that has the potential of unjustly putting many Pennsylvania litigants, in addition to petitioner, out of court without a full and fair opportunity to be heard. The Commonwealth Court decision directly contravenes the mandate of the Supreme Court of Pennyslvania that form must not be exalted over substance and that in the interest of justice the Pennsylvania Rules of Civil Procedure must be liberally construed. *McKay v. Beatty,* 348 Pa. 286-287, 35 A.2d 264, 265 (1944); *In Re Tax Claim Bureau, German Township, Mt. Sterling 54 1/2 Acres, Miscellaneous Buildings,* 496 Pa. at 49-50, 436 A.2d at 146-147; *Pomerantz v. Goldstein,* 479 Pa. at 178, 387 A.2d at

1281. Procedural errors must not be dispositive where the rules have been substantially complied with and no prejudice has resulted from a purely technical error. *Id.*

The Supreme Court of Pennsylvania has strongly stated its commitment to fairness, the substantive merits of the case and Pa. R. Civ. P. 126:

> The trial of a lawsuit is not a sporting event where the substantive legal issues which precipitate the action are subordinated to the "rules of the game." A lawsuit is a judicial process calculated to resolve legal disputes in an orderly and fair fashion. It is imperative that the fairness of the method by which the resolution is reached not be open to question. A rule which arbitrarily and automatically requires the termination of an action in favor of one party and against the other based upon a non-prejudicial procedural mis-step, without regard to the substantive merits and without regard to the reason for the slip, is inconsistent with the requirement of fairness demanded by the Pennsylvania Rules of Civil Procedure. Rule 126 is not a judicial recommendation which a court may opt to recognize or ignore. Rather the rule is a statement of the requirement of fairness and establishes an affirmative duty courts are bound to follow in applying all procedural rules. . . .

Byard F. Brogan, Inc. v. Holmes Electric Protective Company of Philadelphia, 501 Pa. 234, 240, 460 A.2d 1093, 1096 (1983). The Commonwealth Court failed to follow the mandate of the Supreme Court of Pennsylvania and failed to apply Pa. R. Civ. P. 126 as it was required to do. As a result, petitioner is being deprived of his due process rights under the fifth and fourteenth amendments of the United States Constitution and under article I, section I and article I, section 10 of the Pennsylvania Constitution. If the Commonwealth Court decision is allowed to stand, many other Pennsylvania litigants in similar situations will also be deprived of

their due process rights.

The Commonwealth Court's decision is particularly egregious in light of the fact that the very trial judge who originally dismissed petitioner's petition for appointment of a board of viewers let petitioner's amended complaint stand by overruling the City's second set of preliminary objections to petitioner's amended pleading. The trial judge rejected the City's claims with regard to the amendment issue as well as with regard to the statute of limitations and *res judicata* issues. Furthermore, the amendment issue was raised again by Dagit in his motion for summary judgment and was rejected, once again, by another trial judge. Finally, at the trial of this matter, which the Commonwealth Court has now rendered a nullity, the trial judge denied a motion for non-suit by the City which raised, among other issues, the amendment and the statute of limitations issues. Judge DiNubile held that the City's contention that petitioner's amended complaint created a new cause of action and was therefore barred by the statute of limitations was without merit. He found that petitioner's two pleadings were amplifications of each other and were both predicated principally upon negligence. Under Pennsylvania case law it is clear that an amendment will be allowed after the statute of limitations has run where it merely amplifies the original cause of action, *Conner v. Allegheny General Hospital,* 501 Pa. 306, 310, 461 A.2d 600, 602 (1983), or if the original complaint states a cause of action which shows that the plaintiff has a legal right to recover what is claimed in the subsequent complaint. *DelTurco, et al v. Peoples Home Savings Association,* 329 Pa. Super. 258, 274, 478 A.2d 456, 464-465 (1984). Judge DiNubile further held that petitioner should not be precluded from receiving a decision on the merits because of a mere technical miscaption of the complaint and his failure to seek court approval to file it. Judge DiNubile also held that petitioner should

not be barred from recovery since amendments to complaints must be liberally permitted. See App. at A-17–A-18.

Thus, three trial orders allowed the amended complaint to stand and at the trial in this matter Judge DiNubile entered judgment in favor of petitioner and acknowledged that petitioner was entitled to damages due to the defendants' conduct. Despite these findings and the requirement to fairly and liberally construe the rules which is set forth in Pa. R. Civ. P. 126 and which is mandated by the Supreme Court of Pennsylvania, the Commonwealth Court summarily stated without substantiation that once the City's preliminary objections were sustained and the complaint was dismissed there remained nothing to amend. In one simple sentence the Commonwealth Court rendered all of the proceedings between September 17, 1980 and the present time a nullity and callously shut the courthouse door depriving petitioner of the opportunity to be heard concerning the deprivation of his property rights.

Petitioner and all litigants have a constitutional right of access to the courts under the first amendment and the Due Process Clauses of the fifth and fourteenth amendments of the Federal Constitution. *Morello v. James,* 810 F.2d 344, 346 (2d Cir. 1987). Procedural due process requires that parties whose rights are being affected are entitled to be heard. *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972). It is fundamental that, before one can be deprived of a property interest, notice and a hearing must be provided. *Commonwealth of Pennsylvania ex rel Magrini v. Magrini,* 263 Pa. Super. 366, 374, 398 A.2d 179, 183 (1979). The fourteenth amendment prohibition against the state depriving any person of life, liberty or property without due process of law refers and encompasses all the instrumentalities of the state including its judiciary. *Chicago, Burlington and Quincy Railroad Company,* 166 U.S. 226, 233 (1897); *Scott v. McNeal,* 154 U.S. 34, 35 (1893). State action can

result from judicial action. *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 179 (1972); *Joy v. Daniels,* 479 F.2d 1236, 1238 (4th Cir. 1973). The Courts may not violate the due process clause through judicial decrees or judgments. *Sinking Fund Commissioners of Philadelphia v. Philadelphia,* 324 Pa. 129, 134, 188 A. 314, 317 (1936). Thus, no order can be made by a court in the enforcement of a judgment which would take from a litigant substantive property rights in violation of due process. *Id.* This, however, is precisely what the Commonwealth Court of Pennsylvania did in this case and petitioner strongly and sincerely urges this Court to issue a writ of certiorari to review the decision below.

IB. THE SUPREME COURT OF PENNSYLVANIA DEPRIVED PETITIONER OF HIS PROCEDURAL DUE PROCESS RIGHTS UNDER THE FEDERAL CONSTITUTION BY DENYING PETITIONER'S PETITION FOR ALLOWANCE OF APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA, WHICH PETITION RAISED THE FEDERAL QUESTION OF THE DENIAL OF PETITIONER'S DUE PROCESS RIGHTS.

Petitioner petitioned the Supreme Court of Pennsylvania for allowance of appeal from the order of the Commonwealth Court of Pennsylvania. In petitioner's petition he raised the federal question of the denial of petitioner's due process rights. App. at A-32–A-38. Nonetheless, the Supreme Court of Pennsylvania denied petitioner's petition for allowance of appeal.

Constitutional rights are denied by the refusal of the state court to decide the question as well as by an erroneous decision of it. *Lawrence, et al v. State Tax Commission of Mississippi,* 286 U.S. 276, 282 (1932); *Super Tire Engineering Company v. McCorkle,* 550 F.2d 903, 907 (3rd Cir. 1977). The denial by the Supreme

Court of Pennsylvania to review the order of the Commonwealth Court of Pennsylvania was wrong and must be corrected by this Court.

IC. THE COMMONWEALTH COURT OF PENNSYLVANIA DEPRIVED PETITIONER OF HIS PROCEDURAL DUE PROCESS RIGHTS UNDER THE FEDERAL CONSTITUTION BY UNCONSTITUTIONALLY ENGAGING IN LEGISLATIVE RULEMAKING AND BY IMPROPERLY PROMULGATING A NEW STATUTE OR RULE PERTAINING TO AMENDMENT OF PETITIONS FOR THE APPOINTMENT OF A BOARD OF VIEWERS AND BY ENFORCING IT RETROACTIVELY.

Notice is the most basic requirement of due process. *Fuentes v. Shevin,* 407 U.S. at 80. Petitioner was presented with no notice that he would be retroactively subject to a judicially created statute or rule requiring leave of court for amendment of a petition for appointment of a board of viewers. Moreover, any litigant in Pennsylvania who seeks to amend a petition for appointment of a board of viewers could potentially be subject to this unconstitutional judicial attempt at promulgating legislation. In its opinion the Commonwealth Court stated that "an amendment to a Petition to Appoint a Board of Viewers must be filed with the court's permission". App. at A-8. The Commonwealth Court cited *Sunbeam Coal Corporation v. Pennsylvania Game Commission,* 37 Pa. Cmwlth. 469, 391 A.2d 29 (1978) and the Eminent Domain Code in support of this position. Neither, however, supports this position. The *Sunbeam* court did not hold that court permission was required for amendment; rather, it held that, under the circumstances of that case, it was an abuse of discretion *not* to permit amendment.

The Commonwealth Court's analysis at footnote 6 of its opinion, which leads it to the conclusion that leave of court is required to amend a petition to appoint a board of viewers under the Eminent Domain Code, is simply wrong. Pa. Stat. tit. 26, §1-406(e) applies to amendment of the condemnor's declaration of taking, not to amendment of the condemnee's petition for the appointment of a board of viewers which is governed by Pa. Stat. tit. 26, §1-504. Section 1-406(e) specifically provides that the court may allow an amendment or direct the filing of a more specific declaration of taking with regard to a condemnor's declaration of taking. This clause is significantly absent from section 1-504 which applies to preliminary objections to a petition to appoint a board of viewers. It is axiomatic that when the legislature includes specific language in one section of a statute and excludes it from another, it should not be implied where excluded. *Pennsylvania Agricultural Cooperative Marketing Association v. Ezra Martin Co.,* 495 F. Supp. 565 (M.D. Pa. 1980); *Patton v. Republic Steel Corporation,* 342 Pa. Super. 101, 109, 492 A.2d 411, 415 (1985); *Commonwealth of Pennsylvania v. Schmuck,* ____ Pa. Super. ____, ____, 561 A.2d 1263, 1266 (1989). If the legislature intended for leave of court to be necessary to amend a petition to appoint a board of viewers it would have so stated in the statute. To conclude, as the Commonwealth Court did, that "It, thus, follows that for purposes of consistency an amendment to a Petition for the Appointment of Viewers should be permitted with leave of court", App. at A-8, is to unconstitutionally engage in legislative rulemaking to petitioner's severe prejudice and detriment. By doing so, the Commonwealth Court improperly promulgated a statute or rule requiring court approval of amendments to petitions for the appointment of a board of viewers, retroactively applied it and, as a practical matter, threw petitioner out of court, the statute of limitations having run by the time of the ruling on the preliminary objections. Petitioner's

federal due process rights have clearly been violated by the Commonwealth Court's unconstitutional actions and it is respectfully requested that this court right the significant wrong done to petitioner.

ID. THE COMMONWEALTH COURT OF PENNSYLVANIA DEPRIVED PETITIONER OF HIS PROCEDURAL DUE PROCESS RIGHTS UNDER THE FEDERAL CONSTITUTION THROUGH ITS INTERPRETATION OF THE PENNSYLVANIA RULES OF CIVIL PROCEDURE WITH REGARD TO AMENDMENT OF PLEADINGS, WHICH INTERPRETATION CONFLICTED WITH FEDERAL PROCEDURAL DUE PROCESS.

Since the Pennsylvania Rules of Civil Procedure are instructive and the Eminent Domain Code of the Commonwealth of Pennsylvania is silent on the precise issue of amendment of a petition for appointment of a board of viewers, reference to Pa. R. Civ. P. 1033 is particularly appropriate. The Supreme Court of Pennsylvania has frequently held that amendment to pleadings should be liberally granted at any stage of the proceedings. *Bata v. Central Penn National Bank of Philadelphia,* 448 Pa. 355, 379, 293 A.2d 343, 356 (1972); *Wilson v. Howard Johnson Restaurant,* 421 Pa. 455, 460, 219 A.2d 676, 679 (1966); 2 Goodrich Amram 2d §§1033:1, 1033:2, 1033:4 (1976 and Supp. 1989) and the cases cited therein. Even when a trial court sustains preliminary objections on their merits it is generally an abuse of discretion to dismiss a complaint without leave to amend. *Harley Davidson Motor Co., Inc. v. Hartman,* 296 Pa. Super. 37, 42, 442 A.2d 284, 286 (1982). The right to amend should not be withheld where there is some reasonable possibility that an amendment can be accomplished successfully. *Otto v. American Mutual Insurance Company,* 482 Pa. 202, 205, 393 A.2d 450, 451 (1978).

The Commonwealth Court committed error, which resulted in the deprivation of petitioner's due process right to be heard, by finding that once the City's preliminary objections were sustained and the petition was dismissed there remained nothing to amend. This finding directly conflicted with the Pennsylvania Rules of Civil Procedure such as Pa. P. Civ. P. 126, and with the Pennsylvania law just stated that it is generally an abuse of discretion to dismiss a complaint without leave to amend. The Commonwealth Court should have found, at a minimum, that the trial court's silence on the issue of amendment in its order of September 17, 1980 constituted leave to amend because to dismiss the pleading without leave to amend would be an abuse of discretion. In *Harley Davidson Motor Co. v. Hartman, supra,* the lower court sustained preliminary objections in the nature of a demurrer and entered an order dismissing the complaint of Harley Davidson without leave to amend. The Superior Court of Pennsylvania held that the trial court abused its discretion in dismissing the complaint without leave to amend. The Superior Court stated:

> In the event that a demurrer is sustained because a complaint is defective in stating a cause of action, if it is evident that the pleading can be cured by amendment, a court may not enter final judgment, but must give the pleader an opportunity to file an amended complaint . . . . This is not a matter of discretion with the court but rather a positive duty.

Id. 296 Pa. Super. at 42, 442 A.2d at 286. Here, as in *Hartman,* it was an abuse of discretion for the trial court to dismiss petitioner's action without leave to amend and it was error for the Commonwealth Court not to so find. Without a doubt petitioner had a reasonable possiblity that amendment could be accomplished successfully in that the City itself in numerous instances indicated that he had alleged a cause of action in trespass. Moreover,

the trial court ultimately found in petitioner's favor at the trial in this matter, which has now been rendered a nullity by the Commonwealth Court.

As previously stated, the Commonwealth Court's decision is particularly egregious under the facts of this case where the trial judge who entered the order dismissing petitioner's petition, which order was silent on the issue of amendment, thereafter rejected the City's argument against amendment and entered an order overruling the City's preliminary objections. This arguably constituted a direct finding that the first pleading was properly amended. At the very least, this constituted leave of court to amend petitioner's pleading. Additionally, the order of Judge Ribner denying Dagit's motion for summary judgment and the order of Judge DiNubile denying the City's motion for non-suit, all of which pleadings raised the Pa. R. Civ. P. 1033 amendment defense, implicitly constituted leave of court to amend, which can be given at any time. The Commonwealth Court, however, refused to so find.

The Commonwealth Court refused to interpret the rules fairly and liberally as was its duty to do and, thus, deprived petitioner of his due process rights to be heard and denied petitioner ultimate justice. Moreover, other litigants in Pennsylvania who seek to amend pleadings once the statute of limitations has run can also be deprived of their due process rights under the Federal and the State Constitutions. The Commonwealth Court's decision, which the Supreme Court of Pennsylvania declined to review, is wrong, sets unconstitutional precedent and must be corrected by this Court.

IE. THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY DEPRIVED PETITIONER OF HIS PROCEDURAL DUE PROCESS RIGHT TO HAVE AN OPPORTUNITY TO BE HEARD BEFORE BEING DEPRIVED OF HIS PROPERTY BY SUSTAINING THE FIRST SET OF PRELIMINARY OBJECTIONS OF THE CITY OF PHILADELPHIA TO HIS PETITION FOR APPOINTMENT OF A BOARD OF VIEWERS AND DISMISSING THE PETITION WITHOUT SPECIFICALLY GIVING PETITIONER LEAVE TO AMEND HIS PLEADING.

As previously set forth, it is generally an abuse of discretion to dismiss a complaint without leave to amend even where a trial court sustains preliminary objections on their merits. *Harley Davidson Motor Co. v. Hartman,* 296 Pa. Super. at 42, 442 A.2d at 286. Furthermore, the right to amend should not be withheld where there is some reasonable possibility that amendment can be accomplished successfully. *Otto v. American Mutual Insurance Company,* 482 Pa. at 205, 393 A.2d at 451. The Court of Common Pleas of Philadelphia County abused its discretion by dismissing petitioner's petition for appointment of a board of viewers without specifically giving petitioner leave to amend his pleading. Clearly there was some reasonable possibility that amendment could be accomplished successfully since the City itself in its preliminary objections to the petition indicated that petitioner had alleged a cause of action in trespass.

The trial court also failed to comply with Pa. Stat. tit. 26, §1-504, which provides in pertinent part: "The Court shall determine promptly all preliminary objections and make such orders and decrees as justice shall require". The trial court failed to make its determination until seven (7) months after the preliminary objections of the City had been filed. This can hardly be considered

prompt. Moreover, and most importantly, by failing to specifically give petitioner leave to amend his pleading, the trial court failed to make such an order as justice required because, according to the Commonwealth Court decision, the trial court's order sustaining the City's preliminary objections and dismissing petitioner's petition without specifically giving petitioner leave to amend threw petitioner out of Court. This is so despite the fact that petitioner clearly had a cause of action against the City as admitted by the City and as can be seen from the judgment in petitioner's favor at the trial in this matter.

As a result of the interpretations of the Court of Common Pleas of Philadelphia County and the Commonwealth Court of Pennsylvania with regard to the right and ability to amend pleadings under the Pennsylvania Rules of Civil Procedure and the Eminent Domain Code of the Commonwealth of Pennsylvania, which interpretations conflicted with federal procedural due process, and the refusal of the Supreme Court of Pennsylvania to review same, petitioner was deprived of his right to due process guaranteed under the fifth and fourteenth amendments of the Federal Constitution.

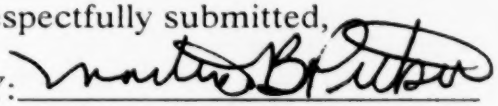
The intent of the founding fathers in creating the Bill of Rights and the Constitution was to protect against abuses where a government entity, such as the City of Philadelphia, commits an admitted wrong and citizens have no redress. The purpose of the Due Process Clause and the court system is to prevent social and individual injustices resulting from unequal economic and political power. Here petitioner, a lone individual, has been steamrolled by the local government entity and by the courts. Petitioner, however, is more than a mere individual; he is a symbol for a principle which dates back to the founding of this country, the right to own property and not to be deprived of it without due process of law. Petitioner turns to this Court to protect and defend his right to due process guaranteed by the Constitution of

the United States. It is, therefore, strongly urged that this Court right the significant wrong done to petitioner and grant his Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, petitioner, Allister Barker, respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

BY: 

MARTIN B. PITKOW
Counsel of Record

ALVIN FREIBERG
DAVID B. COMROE
GLENN F. HING
REBECCA M. LANDES
ROBERT J. WILSON

Counsel for Petitioner

1700 Market Street
Suite 1400
Philadelphia, Pennsylvania 19103
(215) 568-0400

January 29, 1990

APPENDIX

Supreme Court of Pennsylvania
Eastern District

November 1, 1989

Robert J. Wilson, Esquire
LIPMAN, FREIBERG, COMROE & HING
1700 Market Street, Suite 1400
Philadelphia, Pennsylvania 19103

RE: Allister Barker, Petitioner v. Leonard H. Dagit, et al
No. 0612 E.D. Allocatur Docket 1989

Dear Mr. Wilson:

This is to advise you that the following order has been endorsed on your Petition for Allowance of Appeal filed in the above captioned matter:

"October 30, 1989.

Petition Denied.

Per Curiam."

Very truly yours,

Patrick Tassos

Patrick Tassos
Deputy Prothonotary

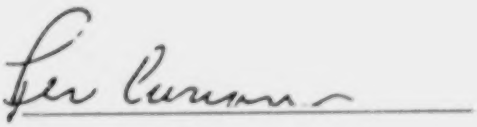
/aw
cc: Hon. Victor J. DiNuile, Jr.
Alan C. Ostron, Esquire
Wayne Partheheimer, Esquire

ALLISTER BARKER	:	IN THE
	:	SUPERIOR COURT
	:	OF PENNSYLVANIA
v.	:	
	:	
CITY OF PHILADELPHIA and	:	No. 1530 Philadelphia, 1988
LEONARD H. DAGIT, INC.	:	No. 1911 Philadelphia, 1988
	:	No. 1941 Philadelphia, 1988
	:	(C.P. 3448 August Term, 1979)

ORDER

AND NOW, this 31st day of August, 1988, these appeals, together with all pending motions and papers, are transferred sua sponte to the Commonwealth Court pursuant to 42 Pa.C.S. §762(a)(7).

BY THE COURT:



ALLISTER BARKER	:	IN THE
Appellant	:	COMMONWEALTH
v.	:	COURT
CITY OF PHILADELPHIA and	:	OF PENNSYLVANIA
LEONARD H. DAGIT, INC.	:	
Appellees	:	NO. 55 T.D. 1988
	:	
	:	
ALLISTER BARKER,	:	
v.	:	
CITY OF PHILADELPHIA and	:	
LEONARD H. DAGIT, INC.	:	
CITY OF PHILADELPHIA,	:	
Appellant	:	NO. 57 T.D. 1988

BEFORE: HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE MADALINE PALLADINO, Judge
HONORABLE ALEXANDER F. BARBIERI, Senior Judge

ARGUED: MARCH 10, 1989

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE DOYLE FILED: June 2, 1989

These are cross appeals from an order of the Court of Common Pleas of Philadelphia County which denied the post-trial motions of the City of Philadelphia (City), Leonard H. Dagit, Inc. (Dagit) (respectively defendant and additional defendant below) and Allister Barker (Barker).

This case is fraught with procedural problems which we must, unfortunately, detail. The lawsuit began in August 1979 when Barker filed a "Petition for the Appointment of a Board of Viewers." The petition alleged that the City, by and through its agent, Dagit, while paving and renovating a playground, paved over and blacktopped a four foot by one hundred foot portion of Barker's land, which was contiguous to the playground, and, in addition, caused structural damage to a building on Barker's property. Barker alleged that these actions constituted a de facto taking of his property and sought appointment of a Board of Viewers for purposes of assessing damages. The City filed preliminary objections to the petition contending that the petition should be dismissed because a de facto taking cannot result from negligent acts and further contending that Barker must seek recovery in a trespass action. Barker filed an answer to the preliminary objections contending, *inter alia*, that he had *not* pled negligence, (and, hence, his case was not one sounding in trespass) and that he had pled a cause of action in eminent domain. On September 17, 1980 the trial court sustained the preliminary objections and dismissed the petition. That order, although signed by Judge Cipriani on September 17, 1980, was not entered on the docket until October 4, 1980,[1] and

1. The thirty day appeal period begins to run when the order has been docketed in the lower court. *See* Pa. R.A.P. 903(a) and Pa. R.A.P. 301(a).

was silent as to whether Barker could amend the petition. On November 5, 1980 Barker did two things: (1) he appealed the September 17 order to the Superior Court[2] *and* he filed what purported to be an "amended complaint" with the common pleas court. We note that on the notice of appeal filed with the Superior Court, there appears the legend "appeal expiration date Nov. 3, 1980." Moreover, the "amended complaint" was filed under the same term and docket number as the original petition but was captioned "Amended Complaint in Trespass and Equity." This two count complaint again pled that in October or November 1977 Barker's property had been partially paved and his building damaged. In Count One, denominated "Trespass," Barker claimed that the City's actions had been negligent and he sought money damages of $587,160.00. In Count Two, denominated "Equity," Barker averred that no remedy at law existed and yet sought the identical amount of money damages as in Count One plus a court order directing the City to remove the blacktop on Barker's property, restore his building, and install a fence on the perimeter line.[3]

The City again filed preliminary objections this time asserting, *inter alia,* (1) that Barker had violated the Pennsylvania Rules of Civil Procedure by "amending" his "complaint" without leave of court, (2) that the appeal to the Superior Court had divested the lower

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2. Appellate jurisdiction was actually with this Court. *See* Section 762 of the Judicial Code, 42 Pa. C.S. §762.

3. We note that the authorities appear to be in dispute as to whether an equity count can be joined with a law count in the same complaint. *See* Standard Pennsylvania Practice 2d, §80:5 (1983) (no joinder of causes of action permitted); *Raw v. Lehnert,* 238 Pa. Superior Ct. 324, 329-30 n.3, 357 A.2d 574, 576 n.3 (1976) (cause of action for contract recision and restitution is inconsistent with request for damages due to breach and may not be maintained at same time in separate counts); *but see* Goodrich-Amram 2d §1508:1 (1977) (joinder of equitable and law claims may be permitted under Pa. R.C.P. No. 1508).

court of jurisdiction and (3) that the two year statute of limitations applicable to a cause of action in trespass had already run.[4]

Barker then filed a praecipe to discontinue his appeal to the Superior Court. While he alleges in his brief that he filed the praecipe on April 27, 1981 (and the trial court so found), our review of the record discloses that the evidence of record reflects that the praecipe was filed May 1, 1981 and that there is absolutely no evidence at all to support the April 27 date. This point is significant because on April 28, 1981, the trial court dismissed the preliminary objections filed in response to the "amended complaint" and the City argues, *inter alia,* that pursuant to Pa. R.A.P. 1701(a) the trial court had no authority to rule on the "amended complaint" while the Superior Court had jurisdiction of the case on appeal.

Once the preliminary objections were overruled, the City filed an answer with new matter and again raised the statute of limitations defense. The case went to trial. At the close of Barker's case, the City moved for a nonsuit which was denied. On March 15, 1988, the court entered a verdict against the City in the amount of $10,000.00, and against Dagit for $5,000.00. All parties filed post-trial motions (Barker alleged that the damages were insufficient) which were denied by order dated May 9, 1988.

The parties then appealed the denial of post-trial relief to the Superior Court which transferred the matter to this Court. The City contends that (1) the lower court erred in entering judgment on the "amended complaint" because it was filed without leave of court or consent of the opposing party, (2) the lower court was divested of

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4. The City also filed a complaint against Dagit as an additional defendant. Dagit was thus involved in this case when it went to trial. It appealed the denial of its post-trial motions to this Court at 56 T.D. 1988, but its appeal was dismissed by this Court because of its failure to comply with an order of this Court.

jurisdiction to act upon the "amended complaint" because the appeal to the Superior Court was still pending, (3) the lower court erred in entering judgment on the "amended complaint" because that complaint stated a new cause of action and the statute of limitations had run and (4) the lower court erred in entering judgment on the "amended complaint" because the entry of such judgment was barred by the doctrine of *res judicata.* Barker cross-appeals contending that the trial court erred in its assessment of damages. As previously noted, *see supra* note 3, Dagit also appealed to this Court and its appeal was dismissed.

We first consider whether the lower court was divested of jurisdiction when an appeal was taken to the Superior Court.[5] It is clear that pursuant to Pa. R.A.P. 1701(a) a trial court is divested of jurisdiction (except for certain technical matters not relevant here) where an appeal is taken. We observe, however, although the parties have not, that the appeal to the Superior Court was *untimely.* The September 17 order was docketed October 4, 1980, and pursuant to Pa. R.A.P. 902(a), the appeal had to be taken within thirty days of that date, *i.e.,* the last day for filing a timely appeal would have been November 3, 1980, a Monday. And, of course, the time period for appeal goes to the subject matter jurisdiction of the court. *Altieri v. Pennsylvania Board of Probation and Parole,* 88 Pa. Commonwealth Ct. 592, 495 A.2d 213 (1985). Thus, the Superior Court never acquired jurisdiction over the original appeal. Therefore, technically, the lower court was not divested of jurisdiction to accept the "amended complaint" but, what is also apparent and of considerable importance is that the trial

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5. Barker contends that the City did not preserve this issue for review because it was not raised in post-trial motions. We view the issue as being subject matter jurisdictional in nature; hence, it can never be waived. *Civil Service Commission of the Borough of Jim Thorpe v. Kuhn,* 85 Pa. Commonwealth Ct. 85, 480 A.2d 1327 (1984).

court's order of September 17, 1989, became the *final judgment* of the court which could not under any circumstances be "amended" by filing an amended "complaint." There was simply no longer any viable "complaint" to amend. The City's argument, therefore, that the court should not have permitted the amendment, is somewhat askew, but its position that the filing of the amended complaint was legally in error, is quite correct.

Even if we were to consider the City's argument that Barker violated Pa. R.C.P. No. 1033, however, by filing the amended complaint without leave of court or without consent of the City, we would be compelled to decide in its favor. We recognize that the Petition to Appoint the Board of Viewers was filed in eminent domain and the Pennsylvania Rules of Civil Procedure are inapplicable to eminent domain matters, although they are considered instructive. *Hall v. Middletown Township Delaware County Sewer Authority,* 75 Pa. Commonwealth Ct. 181, 461 A.2d 899 (1983). We further note, however, that an amendment to a Petition to Appoint a Board of Viewers must be filed with the court's permission. *See, e.g, Sunbeam Coal Corp. v. Pennsylvania Game Commission,* 37 Pa. Commonwealth Ct. 469, 391 A.2d (1978); *see also* Sections 406(e), 502(a) and 504 of the Eminent Domain Code.[6]

Although, under the theory argued by the City, the City does not argue procedure under the Eminent Domain Code (in light of its position that the cause of action is really one in trespass to which the Pennsylvania Rules of Civil Procedure would apply and because the

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6. Act of June 22, 1964, Special Sess., P.L. 84, *as amended,* 26 P.S. §§1-406(e), 1-502(a) and 1-504. Under Section 406(e) the condemnor with the court's permission may amend a declaration of taking. Under Section 504 objections to a Petition for Appointment of Viewers may be filed. It, thus, follows that for purposes of consistency an amendment to a Petition for the Appointment of Viewers should be permitted with leave of court.

"amended complaint" sought to assert a cause of action in trespass), we shall overlook this technical point because we believe that in either case, under either Rule 1033 or Section 502(a) of the Eminent Domain Code,[7] leave of court is needed. *See Sunbeam*. Barker asserts that the lower court's leave can be *inferred* because (1) the trial court overruled the preliminary objections to the "amended complaint" and (2) the trial judge who overruled the preliminary objections was the same one who had sustained the preliminary objections to the original petition. We refuse to accept such an argument; it is dangerous precedent to suggest that leave of court can be inferred. Even if, however, we were to permit such an inference the result would be the same. This is so because once the preliminary objections were sustained and the complaint was dismissed there remained nothing to "amend" even if the litigation had not been terminated by the final judgment entered on October 4, 1980. And, of course, it had been terminated in any event.

Thus, having concluded that the dismissal of the first complaint was not timely appealed, we must hold that the trial court committed error in denying the City's post-trial motions.[8]

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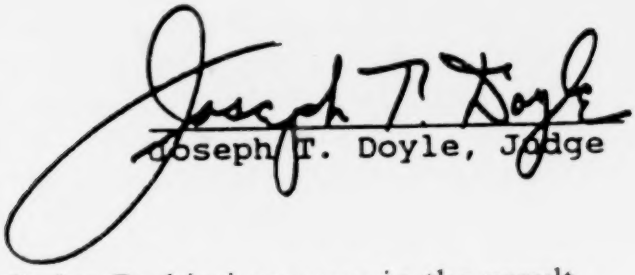
7. 26 P.S. §1-502(a).

8. Our disposition of this case renders it unnecessary to consider the merits of Barker's cross-appeal as to the City. Further, we need not remand for reassessment of damages against Dagit because the verdict was not assessed against the defendants as joint tortfeasers and Barker waived this point by failing in his post-trial motion to ask the trial court to mold the verdict.

Based upon the foregoing opinion, we reverse in part and affirm in part.

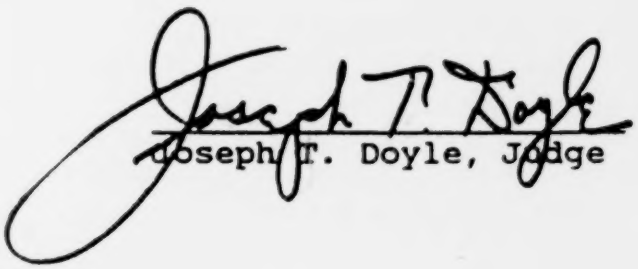


Senior Judge Barbieri concurs in the result.

ALLISTER BARKER	:	IN THE
Appellant	:	COMMONWEALTH
v.	:	COURT
CITY OF PHILADELPHIA and	:	OF PENNSYLVANIA
LEONARD H. DAGIT, INC.	:	
Appellees	:	NO. 55 T.D. 1988
	:	
	:	
ALLISTER BARKER,	:	
v.	:	
CITY OF PHILADELPHIA and	:	
LEONARD H. DAGIT, INC.	:	
CITY OF PHILADELPHIA,	:	
Appellant	:	NO. 57 T.D. 1988

ORDER

NOW, June 2, 1989, the order of the Court of Common Pleas of Philadelphia County is reversed insofar as it is denied the City's post-trial motions and affirmed insofar as it denied Barker's post-trial motion.



CERTIFIED FROM THE
RECORD
AND ORDER EXIT
June 2, 1989

Deputy Prothonotary-Chief Clerk

ALLISTER BARKER	:	COURT OF COMMON PLEAS
	:	PHILADELPHIA COUNTY
vs.	:	AUGUST TERM, 1979
	:	
CITY OF PHILADELPHIA and LEONARD H. DAGIT, INC.	:	NO. 3448

OPINION

BY: DiNUBILE, JR., J.

This case involves appeals resulting from verdicts and subsequent judgments in favor of plaintiff against the defendant, City of Philadelphia, in the amount of $10,000.00, and the additional defendant, Leonard H. Dagit, Inc., in the amount of $5,000.00, rising from a non-jury trial before this court on March 11th, March 14th – March 15, 1988. Post trial motions were timely filed by all parties. A hearing on these motions was held on May 3, 1988 and all were denied on May 5, 1988. Judgments subsequently were entered on these verdicts. This appeal follows. Plaintiff asserts that the court's measure of damages was inadequate. The defendants argue that Plaintiff's claim is barred by the statute of limitations.

The facts, as-found by this court and contained in its findings of fact and conclusions of law, can be stated briefly as follows. The plaintiff, Mr. Barker, is the owner of premises 1535 West Clearfield Street, located in the North Philadelphia section of the City. He purchased this property in 1970 for $8,000.00. Its present assessed value is $9,400.00 with a fair market value, according to City Appraisers as of 1988, of $29,400.00. Sometime in 1975, the defendant, City of Philadelphia, contracted with the additional defendant, Leonard H. Dagit, Inc., to erect a playground on the property directly East of and adjacent to plaintiff's premises. Shortly thereafter, the additional defendant hired a subcontractor to do certain

excavation work in preparation for the laying of cement in the construction of the playground. The subcontractor did not perform the excavation properly; by either negligently shoring the front part of the plaintiff's party wall and or by improperly backfilling it. During the course of the excavation, there also may have been some direct impact to the plaintiff's East wall by machines operated by the additional defendant's subcontractor. The City of Philadelphia, although not in control of the excavation, did have inspectors on the scene weekly. The City failed to detect the improper work of the subcontractor hired by the additional defendant.

The East wall of the plaintiff's property, commencing on Clearfield Street, formed a party line with the adjacent playground property. However, approximately 100 feet of the back portion of the plaintiff's property was not a party wall. A four foot strip just East of plaintiff's building wall was actually part of his property. Although there was some ambiguity in the various plans concerning ownership, the City knowingly ordered the paving over of the 100 by four foot section during the course of the erection of the playground. In addition, a concrete rise which formed a part of the back portion of the playground was erected and attached near the end or rear portion of plaintiff's East wall. It extended back a number of feet further, adding to the encroachment upon the plaintiff's property.

The plaintiff asserts that the damages awarded by this court were inadequate and not supported by the record. The plaintiff presented expert testimony concerning damages to his property. It was predicated principally upon the cost of reconstruction by restoring the building to a perfect condition. The total amount of this estimate, based on today's prices, was approximately $126,000.00. The court found the defendant City liable for the paving over of the four by 100 foot strip as well for the erection of the raised portion of the playground attached to the plaintiff's East wall and for its failure,

through its inspectors, to detect and arrest the negligent excavation of the subcontractor. It is equally clear that the additional defendant who hired the subcontractor was liable for the improper work performed and cannot absolve itself from liability merely because it employed another firm to do the work. However, the plaintiff failed to meet its burden of proof in establishing that his measure of damages are what he asserts on this appeal. This court found that the paving over of the four by 100 foot strip, although a trespass, resulted in minimal damages to the plaintiff. In fact, there was evidence that it actually may have increased the value of his property since the strip, which was originally dirt, became paved. Unquestionably, the plaintiff was entitled to damages for the erection of the rise portion of the playground presently encroaching upon his property. As a result of this construction, the plaintiff is now precluded from using that part covered by this rise. For example, Mr. Barker cannot erect a side fire door on that portion of his East wall. Since it would be impracticable for the City to demolish the playground rise, the plaintiff must be compensated. In addition, both the City and the additional defendant Dagit must pay for the subcontractor's improper excavation which damaged the front part of the plaintiff's property. Although Dagit must share the major burden of this responsibility, the City was liable as well for failure to properly inspect and arrest the negligent conduct of the subcontractor.

Plaintiff asserts that the measure of damages should be the diminution of the value of his property as a result of defendants' liability. However, the plaintiff had failed to prove by a fair preponderance of the evidence that any such diminution actually occurred. The plaintiff maintains that he met this burden by way of his own testimony in which he stated that properties in the area had sold for approximately $50,000.00 to $55,000.00. The court did not accept his self-serving hearsay statements as to valuation which were totally uncorroborated

in the record. The plaintiff alternatively argues that another possible measure of damages, as testified by his expert, is the cost ($126,000.00) of restoration of the building to a perfect condition. However, this sum cannot be a valid measure of damages when it is far in excess of the market value of the property. It represents an expenditure which might be made if the value of the real estate were exceedingly higher and the enterprise to be conducted on the property would be of such a nature that the income generated from it would justify such an outlay of money. The property had been used as an auto repair shop housed in what was basically a two story garage. There is no evidence on the record that the expenditure of the sum suggested by the expert would in any way justify the intended use of the property by the plaintiff, namely, for the purpose of conducting state auto inspections.

The court awarded damages based on the dictates of the case of *PennDot v. Crea*, 483 A.2d 996 (1984) which states that where the cost of restoration of the property to its former condition is equal to or greater than the actual value of the property, then the measure of damages is the actual market value of the property immediately prior to the injury or, in this case, the market value of the plaintiff's property in 1975-1977. Using this method, the court arrived at the sum of $15,000.00. The only objective evidence presented as to the value of the property was the fact that the plaintiff purchased it for $8,000.00 in 1970. Today, according to the City Assessors, it is worth close to $30,000.00. Consequently, a fair estimate of its value in 1975-1977 would approximate $15,000.00.

An alternative approach of fixing a monetary value on the various intrusions upon the plaintiff's property leads to a similar result. An award can be made specifically for the actual intrusion of the playground rise, cost to shore up the front part of the property to be added to the sum of $3,100.00 already expended by the plaintiff

for this purpose, and the approximate sum of $15,000.00 is reached by this method as well. Consequently, the plaintiff's contention that the damages awarded are insufficient is without merit.

Both the defendant and additional defendant have filed a cross appeal alleging that the trial court erred in not overruling previous orders of the Court of Common Pleas in which plaintiff's amended complaint was permitted. They assert that this amendment had the effect of changing the cause of action subsequent to the running of the statute of limitations and is therefore barred. The court disagreed with this contention. In order to understand the nature of this argument, it is necessary to state briefly the convoluted pre-trial history of this case. The alleged acts contained in both the original as well as the amended complaint occurred in October or November, 1977. The plaintiff instituted eminent domain proceedings in that he petitioned for the appointment of a Board of View against the City of Philadelphia in August 1979, alleging basically a negligent confiscation of the 100 by four foot strip of property and other damages previously referred to in this Opinion. The defendant City promptly filed preliminary objections alleging that no cause of action could arise in eminent domain based upon a negligent taking. The City's preliminary objections were sustained on or about 11/5/80. Thereafter, the plaintiff filed a timely appeal to the Superior Court. In addition, he amended his complaint without leave of court alleging the within cause of action based upon negligence and seeking certain equitable relief not inconsistent with his original petition for the appointment of a Board of Viewers. The City filed preliminary objections to the plaintiff's amended complaint on the grounds that the assertions contained in it constituted a new cause of action and consequently was barred by the statute of limitations and the appeal to the Superior Court divested the Common Pleas Court of jurisdiction. In addition, the City asserted that there was

no leave of court to file this amended complaint. These preliminary objections to the plaintiff's amended complaint were filed on 11/21/80. On 12/29/80, the City also filed a complaint against the additional defendant. On 4/27/81, the plaintiff discontinued its appeal to Superior Court on the eminent domain matter. On April 28, 1981, the Court of Common Pleas overruled the City's preliminary objections to the plaintiff's amended complaint. The City then filed an answer to the amended complaint alleging the statute of limitations as a defense.

On 12/18/85, the additional defendant filed a motion for summary judgment arguing for the first time that the action against it was barred by the statute of limitations. It also asserted in this motion, as the City had done in its preliminary objections, that the appeal to the Superior Court divested the Common Pleas Court of Philadelphia of jurisdiction. It never in its pleadings raised nor pleaded the defense of the statute. Its motion for summary judgment was denied on 9/26/86.

The defendant City's contention that the amended complaint created a new cause of action and consequently is barred by the statute of limitations is without merit. Case law is clear that an amendment will be allowed after the statute of limitations has run where it merely amplifies the original cause of action, *Connor v. Allegheny General Hospital,* 461 A.2d 600 (1983) or if the original complaint states a cause of action showing that the plaintiff has a legal right to recover what is claimed in the subsequent complaint. *DelTurco et al. v. Peoples Home Savings Association*, 478 A.2d 456 (1984). In this case, the original cause of action under eminent domain as well as the subsequent amendment were mere amplifications of each other. They both were predicated principally upon negligence. The plaintiff, in his original complaint, merely misnamed the cause of action. He should not be precluded from receiving a decision on the merits merely because of a technical miscaption of the complaint and his failure to seek court

approval to file it. Since amendments to complaints must be liberally permitted, plaintiff should not be barred from recovery. See *DelTurco et al. v. Peoples Home Savings Association, supra.; Connor v. Allegheny General Hospital, supra.; Harley Davidson Motor Co., Inc. v. Hartman*, 442 A.2d 284 (1982). The instant case is clearly distinguishable from *Saracina v. Cotoia*, 417 Pa. 80, 208 A.2d 764 (1965) and *Boarts v. McCord*, 511 A.2d 204 (1986) cited by the defendants. In *Saracina*, the amendment was disallowed by a majority of the court because the plaintiff had sued a different party (the father instead of the son). In *McCord*, the plaintiff had sued in the original complaint to recover under wrongful death and survival actions for the still born delivery of their child. After preliminary objections were sustained, the plaintiff then filed an amended complaint seeking negligent infliction of emotional distress and loss of consortium resulting therefrom. Since no recovery could have been obtained under Pennsylvania law for negligent infliction of emotional distress, the amendment was disallowed. In the instant case, the amendment did not seek to change the party as it did in *Saracina*. Unlike *McCord*, in both the original miscaptioned complaint and its amendment, the plaintiff alleged facts which were actionable, namely, the negligent taking and damage to his property.

Defendants also make an additional argument. They assert that the Common Pleas Court was divested of its jurisdiction at the time of the sustaining of the amended complaint because of the plaintiff's appeal to the Superior Court. At the time of the appeal, the plaintiff also filed his amended complaint with the Common Pleas Court and later discontinued this appeal. In view of these circumstances, it is difficult to see how jurisdiction was divested. In any event, it would be draconian to deny plaintiff's right to recovery based on such a highly technical argument.

The additional defendant further objects to the trial court's refusal to permit an amendment to its complaint at trial alleging the statute of limitations as a defense. The additional defendant was joined in December of 1980. It never raised the statute of limitations in its pleadings. The defense was raised for the first time in a motion for summary judgment on 12/18/85. Clearly under these facts, this objection was waived. Rule 1030 Pa. R. Civ. Pro., see also *Tanner v. AllState Insurance*, 467 A.2d 1164 (1983). This case discusses in depth when an amendment should be permitted. A long unexplained delay between the original complaint and the filing of the motion to amend can operate as a waiver. In this case, there was never any motion to amend filed until done so orally at trial; well over seven years after the additional defendant was joined. The defense was first raised by way of summary judgment five years after joinder. Unquestionably, there is a waiver here. This situation is unlike *Tanner*, where the amendment alleging the statute of limitations was promptly filed a little less than six months after the original filing. The instant case is much more analagous to *Commonwealth v. PennDot v. Bethlehem Steel Corporation*, 404 A.2d 692 (1979), where the motion was disallowed because it was made two years and five months after the original pleading.

BY THE COURT:

DiNUBILE, JR., *J.*

DATED: June 27, 1988

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
TRIAL DIVISION

ALLISTER BARKER	:	AUGUST TERM, 1979
	:	
vs.	:	
	:	
CITY OF PHILADELPHIA	:	
and	:	
LEONARD H. DAGIT, INC.	:	NO. 3448

ORDER

AND NOW, this 9th day of May, 1988, after post trial motions have been denied, judgment is entered on the Court's verdict of March 15, 1988.

BY THE COURT:

DiNUBILE, JR., *J.*

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
TRIAL DIVISION

ALLISTER BARKER	:	AUGUST TERM, 1979
	:	
vs.	:	
	:	
CITY OF PHILADELPHIA	:	
and	:	
LEONARD H. DAGIT, INC.	:	NO. 3448

ORDER

AND NOW, this 5th day of May, 1988, after a hearing was held on May 3, 1988, the post trial motions of all parties are hereby denied.

BY THE COURT:

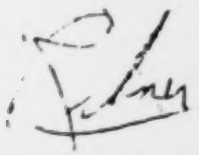
DiNUBILE, JR., *J.*

ALLISTER BARKER	:	COURT OF
	:	COMMON PLEAS
vs.	:	OF PHILADELPHIA
	:	COUNTY
THE CITY OF PHILADELPHIA	:	
and	:	NO. 3448
LEONARD H. DAGIT, INC.	:	AUGUST TERM, 1979

ORDER

AND NOW, this 26th day of September, 1986, upon consideration of the Motion for Summary Judgement submitted by Additional Defendant, Leonard H. Dagit, Inc., and Plaintiff's Answer thereto, it is hereby ORDERED AND DECREED that said Motion is DENIED.

BY THE COURT:



Paul Ribner, *J.*

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

ALLISTER BARKER	:	AUGUST TERM, 1979
	:	
vs.	:	
	:	
CITY OF PHILADELPHIA	:	NO. 3448

ORDER

AND NOW, this 28th day of April, 1981, upon consideration of Preliminary Objection of Defendant to Plaintiff's Amended Complaint, and Answer in opposition thereto, it is hereby ORDERED AND DECREED that Preliminary Objections of Defendant are dismissed; Defendant granted leave to file responsive pleading within twenty (20) days of date hereof to Plaintiff's Amended Complaint in Trespass and Equity.

BY THE COURT:

J.

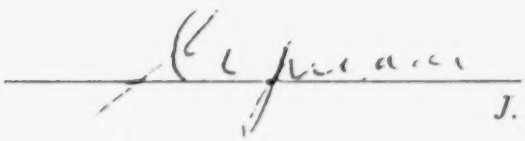
IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

ALLISTER BARKER	:	AUGUST TERM, 1979
	:	
VS.	:	
	:	
CITY OF PHILADELPHIA	:	NO. 3448

ORDER

AND NOW, this 17th day of September, 1980, upon consideration of Preliminary Objections of Defendant, City of Philadelphia, Answer in opposition thereto, oral argument and legal memoranda, it is hereby ORDERED AND DECREED that Preliminary Objections of Defendant, City of Philadelphia, are sustained and Petition for the Appointment of a Board of Viewers is DISMISSED.

BY THE COURT:



J.

U.S. Const. amend. I:

AMENDMENT I – FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Pa . Const. art. I, § 1:

§ 1. Inherent rights of mankind

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Pa. Const. art. I, § 10:

§ 10. Initiation of criminal proceedings; twice in jeopardy; eminent domain

Except as hereinafter provided no person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. Each of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information filed in the manner provided by law. No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.

28 U.S.C.A. § 1257a (West Supp. 1989)

§ 1257. State courts; appeal; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Eminent Domain Code, Pa. Stat. tit. 26, § 1-406 (Purdon Supp. 1989):

§ 1-406. Preliminary objections.

(a) Within thirty days after being served with notice of condemnation, the condemnee may file preliminary objections to the declaration of taking. The court upon cause shown may extend the time for filing preliminary objections. Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure followed by the condemnor; or (4) the declaration of taking. Failure to raise these matters by preliminary objections shall constitute a waiver thereof.

(b) Preliminary objections shall state specifically the grounds relied upon.

(c) All preliminary objections shall be raised at one time and in one pleading. They may be inconsistent.

(d) The condemnee shall serve a copy of the preliminary objections on the condemnor within seventy-two hours after filing the same.

(e) The court shall determine promptly all preliminary objections and make such preliminary and final orders and decrees as justice shall require, including the revesting of title. If preliminary objections are finally sustained, which have the effect of finally terminating the condemnation, the condemnee shall be entitled to damages as if the condemnation had been revoked under section 408, to be assessed as therein provided. If an issue of fact is raised, the court shall take evidence by depositions or otherwise. The court may allow amendment or direct the filing of a more specific declaration of taking.

Eminent Domain Code, Pa. Stat. tit. 26, §1-502 (Purdon Supp. 1989):

§ 1-502. Petition for the appointment of viewers.

(a) The condemnee may file a petition requesting the appointment of viewers, setting forth:

(1) A caption which shall be the caption of the proceeding substantially as set forth in the declaration of taking, with an identification of the petitioner and his property. The petitioner shall be designated as the plaintiff. Except as otherwise ordered by the court, the viewers' proceedings shall be at the same court term and number as the declaration of taking.

(2) The date of filing of the declaration of taking and whether any preliminary objections thereto have been filed and remain undisposed of.

(3) The name of the condemnor.

(4) The names and addresses of all condemnees and mortgagees known to the petitioner to have an interest in his property and the nature of their interests.

(5) A brief description of his property which may include any or all of his properties in the same county taken, injured or destroyed for the same purpose by the condemnor, whether by the same or separate declarations or without a declaration of taking.

(6) A request for the appointment of viewers to ascertain just compensation.

(b) The condemnor may file a petition requesting the appointment of viewers setting forth:

(1) A caption which shall be the caption of the proceeding substantially as set forth in the declaration of taking, to which shall be added the name of the condemnee as plaintiff as to whose property the petition is filed and the name of the condemnor as defendant. If there is more than one condemnee it shall be sufficient to designate the name of the first condemnee as the plaintiff with appropriate indication of other condemnees. Except as otherwise ordered by the court, the viewers' proceedings shall be at the same term and number as the declaration of taking.

(2) The date of the filing of the declaration of taking and whether any preliminary objections thereto have been filed and remain undisposed of.

(3) The names and addresses of all condemnees known to the petitioner to have an interest in the property which is the subject of the petition and the nature of their interests.

(4) A brief description of the property which is the subject of the petition and the interest condemned.

(5) A request for the appointment of viewers to ascertain just compensation.

(c) The condemnor may include in its petition any or all of the property included in the declaration of taking.

(d) The court appointing the viewers may, on its own motion or at the request of a party, direct them to determine the damages for any or all of the properties included in the declaration of taking or any or all properties taken, injured or destroyed for the same purpose by a condemnor without a declaration of taking.

(e) If there has been a compensable injury suffered and no declaration of taking therefor has been filed, a condemnee may file a petition for the appointment of viewers substantially in the form provided for in subsection (a) of this section, setting forth such injury.

(f) A copy of any petition for the appointment of viewers filed by a condemnee shall be sent promptly by registered or certified mail, return receipt requested, to the adverse party.

(g) The court, in furtherance of convenience or to avoid prejudice, may on its own motion or on motion of any party, order separate viewers' proceedings or trial when more than one property has been included in the petition.

Eminent Domain Code, Pa. Stat. tit. 26, §1-504 (Purdon Supp. 1989):

§ 1-504. Appointment of viewers; notice; objections

Upon the filing of a petition for the appointment of viewers, the court, unless preliminary objections to the validity of the condemnation or jurisdiction, warranting delay, are pending, shall promptly appoint three viewers, who shall view the premises, hold hearings, and file a

report. In counties of the first class, the court may appoint an alternate viewer in addition to the three viewers specifically appointed. The prothonotary shall promptly notify the viewers of their appointment unless a local rule provides another method of notification.

The viewers shall promptly give written notice by registered or certified mail, return receipt requested, of their appointment to all persons named as condemnors or condemnees in the petition for the appointment of viewers and of the place and time of the view, which shall not be less than twenty days from the date of said notice.

If notice of the view does not include notice of a time and place of subsequent hearings and a time and place is not agreed upon by the parties at the view, notice of the hearing shall be given by not less than ten days' written notice by registered or certified mail, return receipt requested.

Any objection to the appointment of viewers not theretofore waived may be raised by preliminary objections filed within twenty days after receipt of notice of the appointment of viewers. Objections to the form of the petition or the appointment or the qualification of the viewers are waived unless included in preliminary objections. The court shall determine promptly all preliminary objections and make such orders and decrees as justice shall require. If an issue of fact is raised, evidence may be taken by deposition or otherwise as the court shall direct.

Pa. R. Civ. P. 126:

Rule 126. Liberal Construction and Application of Rules.

The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

Pa. R. Civ. P. 1007:

Rule 1007. Commencement of Action

An action may be commenced by filing with the prothonotary

(1) a praecipe for a writ of summons,

(2) a complaint, or

(3) an agreement for an amicable action.

Pa. R. Civ. P. 1033:

Rule 1033. Amendment

A party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, correct the name of a party or amend his pleading. The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted.

No. 612 E. D. ALLOC. DKT. 198

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ALLISTER BARKER,

Petitioner

vs.

CITY OF PHILADELPHIA and
LEONARD H. DAGIT, INC.,

Respondents

PETITION FOR ALLOWANCE OF APPEAL

From the Order of the Commonwealth Court of Pennsylvania at Nos. 55 and 57, Transfer Docket, 1988, dated June 2, 1989, reversing in part and affirming in part the decree of the Court of Common Pleas of Philadelphia County dated May 9, 1988

ROBERT J. WILSON ESQUIRE
LIPMAN, FREIBERG, COMROE & HING
1700 Market Street, Suite 1400
Philadelphia, PA 19103
(215) 568-0400
Attorney for Petitioner

QUESTIONS PRESENTED

1. Whether a Petition for the Appointment of a Board of View based upon a *de facto* taking is appropriate where the City and its subcontractor, in building a City playground, intentionally paved over a portion of the adjoining land and effectively annexed same to the City's playground?

2. Whether Preliminary Objections in the Nature of a Demurrer are properly sustained without leave to amend or without the taking of further evidence by deposition or otherwise where the possibility of establishing a cause of action exists?

3. Whether the Lower Court violated Petitioners due process rights by creating a new rule pertaining to amendment of Petitions for the Appointment of a Board of View without properly promulgating it and by enforcing it retroactively?

A. Whether Petitioner received, directly or implicitly, leave of Court to amend his pleadings?

3. *The Lower Court violated Petitioner's due process rights by creating a new rule pertaining to amendment of Petitions for the Appointment of a Board of View without properly promulgating same and by enforcing it retroactively.*

Notice is the most basic requirement of due process. *Fuentes v. Shevin*, 407 U.S. 67 (1972). "Parties whose rights are to be affected are entitled to be heard and in order that they may enjoy that right they must first be notified" (Citations omitted). *Goss v. Lopez*, 419 U.S. 565 (1975). The notice provided should be reasonably calculated to inform interested parties of the pending action, and should supply the information necessary to provide an opportunity to present objections. The uncontroverted fact in the instant case is that Petitioner was presented with no notice that he would be retroactively subject to a judicially created rule requiring leave of Court for amendment of his pleading.

The Commonwealth Court decision here is particularly odious, and respectfully submitted, erroneous, in its attempt to promulgate a new procedural rule by judicial fiat and to retroactively enforce same. Judge Doyle, speaking for the Court, stated that amendment of a Petition to Appoint a Board of View requires Court Permission and cited *Sunbeam Coal Corp. vs. Pennsylvania Game Commission*, 37 Pa. Cmwlth 469, 391 A.2d 29 (1978) and the Eminent Domain Code. Neither supports this position. *Sunbeam* merely states, after quoting from *In re Ramsey*, 20 Pa. Cmwlth 207, 342 A.2d 124 (1975) (see *infra*):

> Although we recognize that our case law states only that a lower court can "possibly allow" an amendment of a petition for the appointment of viewers, thus rendering amendment a discretionary act, we believe that if ever there was a case in which amendment should have been permitted, it is this case. *Id.* at _____, 391 A.2d at 33.

In fact in *Sunbeam*, the Court reversed the lower Courts sustaining of Preliminary Objections without leave to amend and permitted amendment. In *Sunbeam* the Condemnor alternatively acknowledged it was condemning in fee simple and then reversed itself stating it was merely condemning surface rights only. In *Sunbeam*, as in the instant case, where there is a factual issue, here as to the intent or negligence of the Condemnor, the proper disposition of Preliminary Objections is to permit the taking of depositions or to permit amendment. The *Sunbeam* Court did not hold that Court permission was required for amendment, rather, it held that under the circumstances of that case, it was an abuse of discretion *not* to permit amendment.

The Commonwealth Court's assumption at footnote six, that leave of Court is required to amend a Petition for the Appointment of a Board of View is simply wrong. Section 1 406(e), Act of June 22, 1964, P.L. 84, *as*

amended, 26 P.S. §1-406(e), applies to amendment of the *Condemnors Declaration of Taking*, not the Condemnee's Petition for the Appointment of a Board of View which is governed by 26 P.S. §1-504. Section 1-406(e), cited by the Court, pertaining to the Declaration of Taking states, where relevant:

> If an issue of fact is raised, the Court shall take evidence by depositions or otherwise. The Court may allow amendment or direct the filing of a more specific declaration of taking.

Significantly, the first sentence of the above is identical to §1-504, which applies to Preliminary Objections to a Petition to Appoint Viewers. Just as significant is the absence of the second sentence above in §1-504. To conclude, as the Commonwealth Court did, that "it follows for purposes of consistency [that] an amendment to a Petition for the Appointment of Viewers should be permitted with Leave of Court" is simply to engage in legislative rule-making, to Petitioners severe prejudice and detriment. By doing so, the Commonwealth Court promulgated a rule requiring Court approval of amendments to Petitions for the Appointment of View, retroactively applied it and as a practical matter put Petitioner out of Court, the statute of limitations having run by the time of the ruling on the Preliminary Objections.

The Commonwealth Court noted that the Appeal to the Superior Court was late and that therefore jurisdiction remained in the Court of Common Pleas. Petitioner contends that he discontinued his appeal to the Superior Court. In either event, jurisdiction was properly with the Court of Common Pleas. Under these circumstances where an action has been timely filed with the possibility that the statute of limitations would expire if a new action would have to be commenced, and with the 1983 amendment resulting in litigation being generally termed "Civil Action" instead of separate forms of action, it would be inappropriate and a miscarriage of justice to

say to Mr. Barker, "you lose – we do not like the form of your original action, you are out of Court and you are out of time for a new action."

Since the Pennsylvania Rules of Civil Procedure are instructive and the Eminent Domain Code is silent on the precise issue of amendment of a Petition to Appoint Viewers, reference to Pa. R.C.P. 1033 is particularly appropriate.

In *Harley Davidson Motor Co., Inc. vs. Hartman*, 296 Pa. Super. 37, 442 A.2d 284 (1982) the lower court sustained Preliminary Objections in the nature of a demurrer and dismissed the Complaint of Harley Davidson and entered and Order dismissing the Complaint *without leave to amend.* In holding that the trial Court abused its discretion in dismissing the Complaint without leave to amend the Superior Court stated:

> Even where a trial Court sustains Preliminary Objections on their merits, it is generally an *abuse of discretion* to dismiss a Complaint without leave to amend . . the right to amend should not be withheld where there is some reasonable possibility that amendment can be accomplished successfully. (emphasis added) *Ott vs. American Mutual Insurance Company*, 482 Pa. 202, 205, 393 A.2d 450 451 (1978). "In the event a demurrer is sustained because a Complaint is defective in stating a cause of action, if it is evident that the pleading can be cured by amendment, a Court may not enter final judgment, but must give the pleader an opportunity to file an Amended Complaint . . . This is not a matter of discretion with the Court but rather a positive duty." *Framlau Corporation vs. County of Delaware*, 223 Pa. Superior Ct. 272, 276, 299 A.2d 335, 337 (1972). See Also: *Longo vs. Rago*, 287 Pa. Superior Ct. 509. 510, 430 A.2d 1006, 1007 (1981); *Mace vs. Senior Adult Activities Center of Montgomery County*, 282 Pa. Superior Ct. 5666, 567, 423

> A.2d 390, 391 (1980); *Itri vs. Lewis*, 281 Pa. Superior Ct. 521, 524, 422 A.2d 591, 593 (1980); *Mellon Bank, N.A. vs. Joseph*, 267 Pa. Superior Ct. 307, 312 406 A.2d 1055, 1057 (1979); 2 Goodrich-Amram, Standard Pa. Practice §1028(3):2 and §1017(b): 11. Id. at , 442 A.2d at 286.

Here, as in *Hartman*, it would have been an abuse of discretion for Judge Cipriani to dismiss Plaintiff's action without leave to amend. Without a doubt Allister Barker "had some reasonable possibility that amendment can be accomplished successfully" in that the City itself in numerous instances indicated that he had alleged a cause of action in trespass.

Appellant, City of Philadelphia has also attempted to find support for its argument in Pa. R.C.P. 1033. Pa. R.C.P. 1033 provides in pertinent part:

> A party, either by filed consent of the adverse party or by leave of court, may at any time . . . amend his pleading. . .

Here, Allister Barker amended his pleading since, in accordance with *Hartman*, he had "some reasonable possibility that amendment can be accomplished successfully". Parenthetically, although the City now is strenuously objecting, Mr. Barker is merely following the City's original "suggestion" contained in it Preliminary Objections to the Petition for the Appointment of a Board of View in pursuing an action in trespass.

Under these circumstances, given the fact that there is no provision governing amendment in the Eminent Domain Code, and under the above authority it was error and an abuse of discretion to sustain the Preliminary Objections to the Petition without leave to amend.

A. *Petitioner received, directly or implicitly, leave of Court to amend his pleadings.*

Alternatively, leave to amend was given either implicitly or directly give by *three* (3) Orders. The City's Preliminary Objections to the Amended Complain: specifically raised the instant amendment objection based on Pa. R.C.P. 1033. Judge Cipriani the *same Judge* who sustained the City's first set of Preliminary Objections overruled this second set of Preliminary Objections. This arguably constituted a direct finding that the first pleading was properly amended. At the very least this implicitly constituted "leave of court" to amend Plaintiff's pleading. Likewise, the Order of Judge Ribner denying Dagit's Motion for Summary Judgment and the Order of Judge DiNublie denying the City's Motion for Non-suit, all of which raised the Pa. R.C.P. 1033 amendment defense, all implicitly constituted "leave of court" to amend which can be given "at any time". Once amended, the Petition should have resulted in the convening of a Board of View and a disposition by that tribunal.

No. 89-1282

In the Supreme Court of the United States

JANUARY TERM, 1990

ALLISTER BARKER,

Petitioner,

v.

CITY OF PHILADELPHIA

Respondent

and

LEONARD H. DAGIT, INC.

Respondent

RESPONDENT CITY OF PHILADELPHIA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF ALLISTER BARKER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT NO. 612 E.D. ALLOCATUR DOCKET 1989

CHARISSE R. LILLIE
City Solicitor
NORMA S. WEAVER
Chief Deputy in Charge of Claims
MIRIAM B. BRENAMAN
Divisional Deputy in Charge of Appeals

CITY OF PHILADELPHIA
Law Department
9th Floor
1101 Market Street
Philadelphia, PA 19107-2996
(215) 592-5218

ROBERT FINKEL
Chief Assistant City Solicitor

Attorneys for Appellee
City of Philadelphia

10 pp

COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Did the Commonwealth Court of Pennsylvania correctly hold that the failure by petitioner to file a timely appeal of the dismissal of his petition to appoint a board of viewers bars his subsequent "amended complaint" seeking tort damages and equitable relief based upon the same set of facts?

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TABLE OF AUTHORITIES

No. 89-1282

In the Supreme Court of the United States

JANUARY TERM, 1990

ALLISTER BARKER,

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CITY OF PHILADELPHIA

Respondent

and

LEONARD H. DAGIT, INC.

Respondent

RESPONDENT CITY OF PHILADELPHIA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF ALLISTER BARKER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT NO. 612 E.D. ALLOCATUR DOCKET 1989

COUNTER-STATEMENT OF THE CASE

On August 24, 1979, petitioner Allister Barker (hereinafter "Barker") filed a petition to appoint a board of viewers, alleging a taking of a portion of his property by the respondent City of Philadelphia (hereinafter "the City"). This alleged taking occurred in October or November, 1977 and involved the paving of a four foot by 100 foot section of property. On

February 25, 1980 the City filed preliminary objections which alleged, *inter alia*, that the petition failed to state a cause of action. On September 17, 1980, the lower court sustained the City's objections and dismissed the petition (A-24). The order did not grant leave to amend. The prothonotary docketed this order on October 4, 1980. On November 5, 1980, thirty-two (32) days later, Barker filed an amended complaint in trespass and equity. On the same day, Barker filed a notice of appeal from the order entered October 4, 1980.

The City filed preliminary objections to the amended complaint. Thereafter the City filed a third party complaint joining appellee Leonard H. Dagit, Inc. (hereinafter "Dagit"), the contractor who actually performed the paving. The City's objections alleged that Barker violated the rules of civil procedure in filing an amended complaint without consent or leave of court. Additionally, the City raised the bar of a pending prior action, the doctrine of res judicata, and informed the court that the matter was still on appeal. On April 28, 1981, the lower court denied the City's objections (A-23). The City then filed an answer and new matter raising all of these issues as affirmative defenses. On May 1, 1981, Barker filed a praecipe to withdraw and discontinue his appeal. Apparently Barker filed the praecipe with the Common Pleas Court prothonotary on April 27, 1981. However, the Superior Court prothonotary did not docket this, and it did not become effective, until May 1, 1981.

On December 17, 1985, Dagit filed a motion for summary judgment. Dagit raised, *inter alia*, the same issues raised by the City. The lower court denied this motion on September 26, 1986. Thereafter, the case went to trial. At the close of Barker's case, the City moved for a nonsuit. The court denied this motion. On March 15, 1988, the court entered a verdict against the City in the amount of $10,000.00 and against Dagit in the amount of $5,000.00. The City filed a motion for judgment not withstanding the verdict, as did Barker and Dagit. The lower court denied all post trial motions and entered judgment on the verdict (A-20, 21). All

parties appealed. The Commonwealth Court reversed that portion of the judgment directed against the City (A-11).

Barker filed a petition for allowance of appeal in the Supreme Court of Pennsylvania. On October 30, 1989, the Court denied this petition (A-1). This petition followed.

SUMMARY OF ARGUMENT

Petitioner's frivolous writ of certiorari petition presents absolutely no grounds for this Honorable Court to exercise its discretion and grant review. Petitioner's argument boils down to a request that this Court act as a super-Supreme Court of Pennsylvania, deciding state law issues of proper pleading and appellate practice. The record reveals that Barker failed to file a timely appeal from the order dismissing his eminent domain petition. Therefore he waived any right to pursue any cause of action, based on the doctrine of *res judicata*.

ARGUMENT

As the Commonwealth Court of Pennsylvania correctly noted, the September 17, 1980 order, which granted the City's preliminary objections and dismissed the petition, was docketed on October 4, 1980. Pursuant to Pa. R.A.P. 902(a), an appeal had to be taken within thirty days of October 4, 1980. This period expired on Monday, November 3, 1980. However, petitioner did not file his appeal until Wednesday, November 5, 1980, thirty-two days after the order was docketed.

Utterly ignored by petitioner is the Commonwealth Court's holding. "[W]hat is also apparent and of considerable importance is that the trial court's order of September 17, 1989 [sic-1980], became the *final judgment* of the court which could not under any circumstances be 'amended' by filing an amended 'complaint'. There was simply no longer any viable 'complaint' to amend." (Slip Opin. at 6) (emphasis in original). This holding finds support in *Catanese v. Taormina*, 437 Pa. 519, 263 A.2d 372 (1970). In *Catanese*, plaintiff's complaint against one defendant was dismissed by way

of preliminary objections as in the case at bar. Instead of appealing, plaintiff filed an amended complaint against this defendant. The Pennsylvania Supreme Court sustained the dismissal of this complaint. The Court reasoned that "[w]hen the period during which an appeal could have been filed expired, the doctrine of *res judicata* became applicable to the cause of action the complaint attempted to state." *Id.*, 437 Pa. at 521, 263 A.2d at 374.

In the case at bar, petitioner failed to file a timely appeal after his petition had been dismissed. As in *Catanese*, petitioner's cause of action was barred by the doctrine of *res judicata*. Petitioner could not amend his complaint *sua sponte* and could not receive permission to amend his complaint.

Petitioner argues at length that the trial court erred in dismissing his petition without giving him leave to amend. However, as the *Catanese* Court made clear, "[t]he question whether the court below acted properly in dismissing the complaint rather than permitting amendment . . . is not before us now." *Id.*, 437 Pa. at 521, 263 A.2d at 373-4. This question could only be considered after a timely appeal. As in *Catanese*, petitioner waived his right of appellate review of the lower court's dismissal of his pleading without leave to amend by failing to file a timely appeal.

Petitioner's due process argument is a meritless for several reasons. Initially, petitioner did not seek to amend his petition to more fully set forth a cause of action in eminent domain. He sought to change his cause of action to one for trespass and equity. Therefore he needed court permission pursuant to Pa.R.Civ. P. 1033. Secondly, even if he had wanted to file an amended petition to appoint a board of viewers (which he obviously did not) he still needed court permission. *Sunbeam Coal Corp. v. Commonwealth, Game Commission*, 37 Pa. Commw., 469, 391 A.2d 29 (1978), upon which petitioner relies, make clear that "our case law states only that a lower court can 'possibly allow' an amendment of a petition for the appointment of viewers, thus rendering amendment a discretionary act . . ." *Id.*, 37 Pa Commw. at 478, 391 A.2d at 33. Neither *Sunbeam* nor any other case

statute or rule of court permits a party to file any amended pleading without leave of court. Although a lower court may abuse its discretion in not permitting an amended pleading, as in *Sunbeam*, a party must still seek court permission to file an amended pleading. The failure to obtain court permission to file an amended complaint renders it a nullity. *Catanese*.

Petitioner has not argued and cannot argue that a thirty day appeal period is a denial of his due process rights. Nor may petitioner argue that the doctrine of *res judicata* is a denial of his due process rights. Petitioner cannot cite any rule or case law that permits a party to *sua sponte* file an amended pleading after the cause of action is dismissed, or holds that a party's due process rights are violated if he fails to timely appeal and decides instead, after the expiration of the appeal period, to file an amended pleading absent court permission.

No constitutional issues are presented in this case. Petitioner merely failed to protect his rights by filing a timely appeal with the appellate court. This petition is a desperate attempt to forestall the consequences of this negligence. Therefore, this Court should reject the petition.

CONCLUSION

No constitutional rights have been violated. No special and important reasons have been presented. Therefore this Court should exercise its discretion and deny this petition.

Respectfully submitted,

CHARISSE R. LILLIE
City Solicitor

NORMA S. WEAVER
Chief Deputy City Solicitor

MIRIAM B. BRENAMAN
Divisional Deputy in Charge
of Appeals

By:_____
ROBERT FINKEL
Chief Assistant City Solicitor